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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER MURRAY, Defendant and Appellant.	B203444 (Los Angeles County Super. Ct. No. KA074614)

APPEAL from the judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed in part, reversed in part and remanded with directions.

Diana M. Teran, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters, and Ellen Birnbaum Kehr, Deputy Attorneys General, for Plaintiff and Respondent.

Christopher Murray appeals from the jury's verdict that he was sane when he murdered two persons and tried to murder another. For the reasons set forth below, we affirm the sanity verdict but reverse and remand for resentencing because the trial court should have stricken a multiple murder special circumstance allegation and also failed to exercise its discretion to choose between a term of life without parole or a sentence of 25 years to life.

FACTS AND PROCEDURAL HISTORY

On the morning of April 3, 2006, Christopher Murray, accompanied by two companions, confronted Christopher Trevizo and his two companions, because Trevizo had earlier stolen some marijuana from Murray and threatened to "fuck him up." One of Murray's companions pulled a gun and pointed it at one of Trevizo's friends. Murray then pulled out a gun and shot and killed Trevizo and one of Trevizo's friends. Murray fired at the third man as he fled, but missed. Murray turned himself in to the police later that day, and was taken to the hospital for observation and treatment after he began to hyperventilate.

Murray was charged with two counts of murder and one count of attempted murder. As to both murder counts the information alleged that Murray committed multiple murders for purposes of the special circumstances provision found at Penal Code section 190.2, subdivision (a)(3).[1] Murray pleaded no contest to all three counts, and admitted that the murders were of the first degree. He also admitted the section 190.2 special circumstance allegations.

Murray contended he was insane at the time of the crimes and had a jury trial on the issue of his sanity. Murray was a 17-year-old high school senior when the crimes occurred. According to Murray's mother, he had self-control problems, was moody, and was easily angered or depressed. Although school officials encouraged her to seek psychological counseling for Murray, she did not for several years due to her bias against

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[1] All further undesignated section references are to the Penal Code.

such treatment. When Murray began abusing drugs at age 15, however, she took Murray to a drug counselor. His behavior worsened in the months before the shootings. He complained of severe headaches, back pain, insomnia, and that he was hearing voices.

Murray was examined by a defense psychologist and two prosecution psychiatrists. Murray told them he did not recall firing the gun, but believed Trevizo was pulling a gun of his own. He recalled running away after hearing shots and seeing the two victims on the ground. His memory of the shooting was like watching a black and white movie where someone else was the shooter. Sometime after Murray fled, his memory came back

The defense psychologist spent many hours with Murray in custody. After administering numerous tests, he concluded that Murray suffered from poly-substance abuse, paranoid schizophrenia, bipolar disorder, dissociative disorder, attention deficit disorder, and obsessive-compulsive behavior. According to the defense psychologist, Murray had been in the mid to full-blown stages of schizophrenia since he was 16. He believed Murray did not know right from wrong when the shootings occurred, and that his insanity began when Murray believed Trevizo was pulling a gun and ended within an hour.

The two prosecution psychiatrists spent perhaps an hour each interviewing Murray, and did not administer any psychological evaluation tests. They concluded Murray did not suffer from any of the disorders diagnosed by the defense psychologist. Although Murray suffered from marijuana abuse, he had no acute psychiatric disorders. Murray's history of social interactions was contrary to a finding of schizophrenia, they said, because schizophrenics are usually isolated. It was very unlikely that a schizophrenic would become psychotic for only a few minutes. Also, schizophrenia and bipolar disorder rarely occur together and it was also unusual for someone under 18 to be schizophrenic. Both concluded that Murray was not insane at the time of the shootings.

The jury determined that Murray was sane when the crimes occurred. The court imposed the following sentence: On counts 1 and 2 for murder, life without parole, plus another 25 years to life for the firearm use enhancement of section 12022.53, subdivision

(d); and on count 3 for attempted murder, the upper term of nine years, plus 20 years for the firearm enhancement of section 12022.53, subdivision (c).

Murray contends the sanity verdict must be reversed because the trial court did not excuse for cause a juror who was biased against the insanity defense. In the alternative, he contends he received ineffective assistance of counsel because his trial counsel did not challenge that juror either for cause or peremptorily. Murray also contends that sentencing error occurred because the trial court did not strike one of the two multiple murder special circumstance allegations and because it appeared the court did not exercise its discretion to consider whether to impose sentences of 25 years to life for the two murder counts instead of the life without parole sentences that were handed down.

DISCUSSION

1. The Trial Court Was Not Required to Excuse Juror No. 5

Murray contends the trial court should have excused Juror No. 5 for cause because her voir dire answers showed she was prejudiced against murder defendants who claimed insanity as a defense. Juror No. 5 said a member of her family had been killed in 2000. She answered "I don't think so" when asked if she could put that aside and decide Murray's case based on only the evidence presented. When the prosecutor asked for more details, Juror No. 5 said a family member had been shot. Asked if it had been a drive-by shooting, Juror No. 5 said she would prefer not to talk about it. The court said it would ask her for more details in private at a later time. Defense counsel then asked all the prospective jurors whether they felt they were unqualified to determine, or felt uncomfortable about determining, the sanity issue. Juror No. 5 answered, "I think that – I don't know if I can say – it's like an excuse to say insane."

Juror No. 5 was then questioned at sidebar. She said a relative had been "ambushed" at a gas station in 2000 and her younger brother was once held at gunpoint at another gas station. The court reminded her that sanity was the only issue and asked if she could be fair and objective in making that determination. She said no, and when the

prosecutor followed up, said, "I guess I still have a grudge, maybe." The prosecutor asked if the incidents involving her family would cause her to side with the prosecution, and Juror No. 5 replied, "Yeah. Even though I know that's unfair for him."

Juror No. 5 said she understood when defense counsel pointed out that Murray's guilt had been decided and that his sanity was the only issue. Asked by defense counsel what her vote what would be "at this time?" she said, "Well, now I'm confused." Asked the same question again, she said, "I wouldn't want to say insane, because I don't know. But I just told her that I would – I don't know now." The following colloquy then occurred:

> [Defense counsel]: Do you think there's any possibility that after hearing from some experts and hearing maybe some evidence from some people that were there or some people that saw him right before or right after that it might cause you to change your mind –
> [Juror No. 5]: Yes.
> [Defense counsel]: -- and think maybe this guy was nuts or maybe this guy is just faking it?
> [Juror No. 5]: Yes. Uh-huh.
> [Prosecutor]: So you'd be willing to listen to the evidence?
> [Juror No. 5]: Yes.
> [The court]: Not happily?
> [Juror No. 5]: Yeah.
> [Prosecutor]: You would do your job as a juror?
> [Juror No. 5]: Yeah.
> [The court]: Okay. [¶] Mr. [defense counsel]?
> [Defense counsel]: Would you hate us for the rest of your life with a white hot hate if we didn't kick you off this panel?
> [Juror No. 5]: No.

Juror No. 5 was not questioned again. Murray's trial lawyer did not challenge Juror No. 5 either peremptorily or for cause, and she remained on the jury.

Under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 16 of the California Constitution, a criminal defendant is entitled to a

trial by a fair and impartial jury. (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) Murray contends Juror No. 5 exhibited such bias against his defense that the trial court should have excused her for cause on its own motion. The trial court has no such duty, however. (*People v. Kipp* (1998) 18 Cal.4th 349, 365.) In order to raise a claim on appeal that a juror should have been excused for cause, the defendant must have exhausted his peremptory challenges or justified his failure to do so. Neither contingency has occurred here, and we therefore reject Murray's challenge on this ground. (*Ibid.*)

2. *Murray Did Not Receive Ineffective Assistance of Counsel*

Murray contends he received ineffective assistance of counsel because his lawyer did not challenge Juror No. 5 either for cause or peremptorily. In order to prevail on this theory, Murray must show that his lawyer's performance was deficient because it did not meet an objective standard of reasonableness under prevailing professional standards, and that absent counsel's error, a different result was reasonably probable. (*In re Andrews* (2002) 28 Cal.4th 1234, 1253.)

The record shows that despite Juror No. 5's initial doubts about her own impartiality, under careful questioning by the court and counsel, those doubts were removed to the apparent satisfaction of all. When the true nature of the sanity inquiry was explained, along with the obligation to listen to and consider expert and lay witness testimony about Murray's behavior, Juror No. 5 declared herself ready to listen to the evidence and perform her duties as a juror. As a result, cause for dismissal did not exist. (*People v. Coffman* (2004) 34 Cal.4th 1, 48; *People v. Holt* (1997) 15 Cal.4th 619, 650-651 [cause to excuse prospective juror exists when voir dire responses convey a definite impression that the juror's views would prevent or substantially impair the performance of her duties]; see *People v. Bittaker* (1989) 48 Cal.3d 1046, 1089 [trial court had discretion to determine that no cause to excuse existed where juror's ambiguous remarks indicating possible bias were properly explained].)

As for defense counsel's failure to make a peremptory challenge to Juror No. 5, we note that because such challenges are "inherently subjective and intuitive, an appellate

record will rarely disclose reversible incompetence in this process." (*People v. Montiel* (1993) 5 Cal.4th 877, 911.) Defense counsel carefully questioned this juror and, despite the juror's initial statements indicating bias, was satisfied with her later responses where she confirmed her ability to listen to and evaluate the evidence impartially. We see no basis on the face of the record before us to second guess counsel's decision in this matter and therefore see no grounds for reversal.

3. *A Multiple Murder Special Circumstance Allegation Must Be Stricken*

Section 190.2 multiple murder special circumstances were alleged as to both murder counts. As Murray contends and respondent concedes, by law only one was proper and the other should be stricken. (*People v. Danks* (2004) 32 Cal.4th 269, 315.)

4. *It Is Unclear Whether the Trial Court Exercised Its Discretion to Consider Imposing a Lesser Sentence*

Because Murray was 17 when his crimes occurred, the trial court had discretion to impose murder sentences of either life without the possibility of parole or 25 years to life. (§ 190.5, subd. (b).) At the sentencing hearing, defense counsel told the trial court that a probation officer's report was not required because the only possible sentence for the murder counts was life without parole. Defense counsel said that because of Murray's age, Murray was not eligible for the death penalty, but, based on his research, "the court has no discretion other than to sentence him to LWOP. And I have so advised him that that is what his sentence is going to be."

The court replied, "And I agree with that part."

Murray contends this shows the trial court did not recognize its sentencing discretion, requiring a remand for resentencing.[2] The record is not as clear as Murray contends. When the trial court said it "agree[d] with that part," it might have been referring to defense counsel's final statement that he told Murray his sentence would

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[2] Murray has abandoned his contention that the trial court could not impose consecutive terms of life without parole.

definitely be life without parole, and not the preceding part, where defense counsel told the court it had no discretion to impose a different sentence. The People make the very reasonable argument that considering the trial court sentenced defendant to the upper term on count 3, and made that sentence consecutive to the other counts, there is no reasonable probability the court would have sentenced defendant to 25 years to life. There is strong logic to this point. Nevertheless, on the state of the record, where neither the court nor defense counsel nor the prosecutor said a word about the sentence choices, the record is sufficiently ambiguous as to whether the court in fact exercised its discretion to warrant reversal and a remand for resentencing. (*People v. Reeder* (1984) 152 Cal.App.3d 900, 916.)

DISPOSITION

The sanity verdict is affirmed. The judgment is reversed only insofar as the two murder sentences are concerned. The matter is remanded for resentencing on those counts, along with an order that one of the multiple murder special circumstance allegations be stricken.

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RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BAUER, J.*

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.